In the Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 698.

WARNER COAL CORPORATION,
Petitioner,

vs.

COSTANZO TRANSPORTATION COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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STATEMENT OF FACTS.

We shall in this statement include only those facts which are pertinent to a consideration of the issues raised by the petition for writ of certiorari. Petitioner on August 26, 1942, entered into an indenture of lease under the terms of which it acquired the right under certain conditions to operate the Richland and Costanzo coal mine property for a period of twenty (20) years. It did not acquire fee simple title to the real estate, but merely the right to mine and remove the coal therefrom subject to the payment of monthly royalties and subject to the other conditions of the lease. The lease provided, among other things, that the Lessor would by bill of sale convey to the Lessee certain mining equipment. The lease further provided, however, (Petr's. Ex. 3, Rec. 114) that at the time of its execution the machinery to be conveyed was sufficient to mine and prepare seventy thousand (70,000) tons of coal per month,

and that throughout the terms of the lease Lessee was required to at all times keep in the mines sufficient equipment to mine and prepare seventy thousand (70,000) tons of coal per month. (Sec. 9.) The bill of sale conveying this equipment to the Lessee was subsequently delivered to the Lessee. Therefore, while the Lessee had the right to remove the several pieces of equipment and sell them, it was nevertheless required to immediately replace such equipment with machinery of like capacity. This lease also contained a provision forbidding the subletting or assignment of the lease without the written permission of the Lessors. The undisputed evidence showed that at the time of the cessation of mining operations by Petitioner (June 15, 1943) there was located in the mines only sufficient equipment to mine and prepare between fifty-five thousand (55,000) and sixty thousand (60,000) tons of coal per month. (Rec. 157.) Therefore, on June 15 all of the machinery and equipment located in the mines was required by the terms of the recorded lease agreement to remain on the premises. Petitioner, about September 1, 1942, commenced mining operations under the lease and continued the operation of the mines thereafter until June 15, 1943, at which time it closed the mines, and they were not again operated until about October 22, 1943, when an Operating Receiver was appointed by the Federal District Court as a result of the commencement of this action.

In its brief Petitioner suggests, as it did in the lower Courts, that the closing of the mines on June 15 was a temporary suspension of mining operations. The facts are to the contrary. On June 12, 1943, Mr. Geddes, Executive Vice President of Petitioner, wired Deputy Solid Fuels Administrator for War that unless the Federal Government gave Petitioner financial assistance the mines would be closed permanently on June 15. (Rec. 164.) The financial assistance was not forthcoming, and the mines were closed on the date fixed. As shown by the minutes of Peti-

tioner's Board of Directors, on June 15 the company did not have sufficient capital to meet payrolls. (Rec. 146.) Petitioner, during every month that it operated the mines, did so at a loss, until during the first half of the month of June, 1943, Petitioner's cost of mining and preparing its coal was Fifty-one Cents (51¢) per ton in excess of the maximum selling price under the Code. Furthermore, Petitioner's Board of Directors in its meeting on June 15, 1943, recites in its minutes that it was necessary to close the mines because its financial condition was such that it could not meet its obligations in an orderly manner. (Rec. 146 and 151.)

As appears from Petitioner's brief, it paid Ten Thousand Dollars ($10,000.00) for the leasehold and Ninety Thousand Dollars ($90,000.00) for the bill of sale to the mining equipment, and these items were listed at these values less depreciation in all of Petitioner's balance sheets except those reconstructed for the purpose of this litigation. Excluding from Petitioner's claimed assets the market value of the machinery and the value of the leasehold, Petitioner had an actual deficit of Two Hundred Forty Thousand Four Hundred Thirty-five Dollars and Thirty-eight Cents ($240,435.38).

NO REASONS PRESENTED FOR ALLOWANCE OF WRIT OF CERTIORARI.

The only reason offered by Petitioner for the allowance of the writ of certiorari is that the decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Fifth Circuit in the case of *Lasswell vs. Stein-Block Co., et al.*, 93 F. (2d) 322, and with the decision of the Sixth Circuit in the case of *Re Nathanson Bros. Co.*, 64 F. (2d) 912. Even a cursory examination of those cases and of the facts in the instant case requires the conclusion that the principles of law announced in the decisions of the Fifth and Sixth Circuits are not applicable

to the facts in this case. Both of the decisions cited were argued at length to the District and Circuit Courts below. The *Lasswell* case holds simply that a community homestead which is exempt from execution in the State of Texas may nevertheless be included among the assets of an alleged bankrupt, although this property may not be sold without the alleged bankrupt's wife's consent. The distinction between that case and the facts here involved is that the alleged bankrupt in the *Lasswell* case owned property which was not subject to liens or encumbrances, whereas the coal mining machinery was subject to an encumbrance in the nature of a mortgage which placed the Lessor in a position prior to the Lessee's creditors. This distinction was clearly recognized by the Circuit Court below. Although Petitioner had no legal right to remove any of the machinery and sell the same without immediately replacing it, Petitioner proceeded to trial in the District Court upon the assumption that it owned the equipment outright and could sell it without satisfying its prior obligation (which was a matter of record) to the Lessor. Petitioner offered evidence of the market value of the several items of machinery and equipment. This evidence, in view of the terms of the lease under which the equipment was acquired, was clearly incompetent. The most that Petitioner could be said to own by virtue of the lease agreement and the bill of sale was a right to operate the mines and use the equipment in accordance with the terms of the lease.

The Nathanson Bros. Co. case, *supra,* holds simply that:

> "If business of alleged bankrupt is, in fact, being conducted at time of alleged bankruptcy, then items of property constituting its assets must be considered as property of 'going concern' for purpose of determining whether alleged bankrupt is solvent."

There is no conflict between the decisions of the Courts below and the decision of the Sixth Circuit in the case above

quoted. In the first place, as appears clearly from the statement of facts herein, Petitioner was not after June 15, 1943, a going concern. It was "in fact" defunct. Its only business was that of mining and selling coal, and after June 15 it neither mined nor sold a ton. Furthermore, even if we should indulge the assumption that Petitioner was a going concern, then we are confronted with the fact that there is no evidence in the record to indicate that Petitioner had any going concern value. All of the evidence showed that Petitioner operated at a loss during every month, and that the extent of its loss became progressively greater with each additional month's operations. Petitioner has argued that the book value of its leasehold ($9,557 plus some alleged improvements) should be included as an asset. While we disagree with this contention because of the nonassignability of the lease and other facts of legal significance, it should be pointed out that the inclusion of this item as an asset on the theory of going concern value or some other basis would be of little help to a debtor insolvent in excess of Two Hundred Forty Thousand Dollars ($240,000.00). The Circuit Court of Appeals, as appears from the language of its opinion, gave Petitioner the benefit of every doubt when it stated:

> "* * * there was no evidence that the interest of the Coal Company in the machinery and equipment had a greater value than the sum of $90,000 at which the Coal Company had purchased it and was carrying it on its books. Encumbered as it was with the obligation that it should be used and subjected to wear and tear for a long period in mining operations, it cannot be said, *in the absence of any evidence*, that it had a greater value in the hands of the Coal Company." (Rec. 193.) (Italics supplied.)

There is, therefore, no basis for Petitioner's argument that the decision of the Circuit Court of Appeals herein is in conflict with the decisions of other Circuit Courts.

Clearly, there are no special or important reasons for a review of this case. It is an ordinary run-of-mine bankruptcy case which has been ably considered and accurately decided by the two lower Courts.

The remainder of Petitioner's brief presents nothing in addition to that urged before the Circuit Court of Appeals. Soper, Circuit Judge, in the opinion of the Court ably discusses and disposes of Petitioner's argument. (Rec. 187.)

For the foregoing reasons we submit that the writ of certiorari should be denied.

Respectfully submitted,

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